STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

CHRISTINA PARAPROFESSIONAL ASSOCIATION, DSEA/NEA, CHRISTINA SECRETARIES ASSOCIATION, DSEA/NEA, and CHRISTINA FOOD SERVICE WORKER'S ASSOCIATION, DSEA/NEA	:	
Petitioners,	:	
v.	:	
CHRISTINA SCHOOL DISTRICT BOARD OF EDUCATION,	:	
Respondent.	:	
AND	:	**CONSOLIDATED REQUEST FOR DECLARATORY STATEMENT**
COLONIAL PARAPROFESSIONAL ASSOCIATION, DSEA/NEA, COLONIAL TRANSPORTATION ASSOCIATION, DSEA/NEA, and COLONIAL FOOD SERVICE WORKERS ASSOCIATION, DSEA/NEA	:	**D.S. No. 95-08-152/153**
Petitioners,	:	
v.	:	
COLONIAL SCHOOL DISTRICT BOARD OF EDUCATION,	:	
Respondent.	:	

Omar Y. McNeill, Esq. Young, Conaway, Stargatt & Taylor for the Associations
David H. Williams, Esq., Morris, James, Hitchens & Williams, for the Districts

STIPULATED STATEMENT OF FACTS AND PROCEEDINGS [1]

I. Statement of Proceedings

1. The Christina Paraprofessional Association, DSEA/NEA, the Christina Secretaries Association, DSEA/NEA and the Christina Food Service Worker's

[1] As agreed to by the parties in the mutual stipulation of August 16, 1996.

Association, DSEA/NEA, ("Christina Associations"), charging parties in U.L.P. No. 95-08-153, are employee organizations within the meaning of 14 Del.C. §4002(h). They are the exclusive representative of certain employees in the Christina School District within the meaning of 14 Del.C. §4002(i). The Respondent, Christina School District Board of Education ("Christina"), is a public school employer within the meaning of 14 Del.C. §4002(n). The collective bargaining agreements duly negotiated between the Christina Associations and Christina contain a provision requiring the Christina School District to collect membership dues from the wages of members of the Christina Associations, and service fees from the wages of the nonmembers.

2. The Colonial Paraprofessional Association, DSEA/NEA, the Colonial Transportation Association, DSEA/NEA, and the Colonial Food Service Worker's Association, DSEA/NEA, ("Colonial Associations"), charging parties in U.L.P. No. 95-08-152, are employee organizations within the meaning of 14 Del.C. §4002(h). They are the exclusive representatives of certain employees in the Colonial School District within the meaning of 14 Del.C. §4002(i). The Respondent, Colonial School District Board of Education ("Colonial"), is a public school employer within the meaning of 14 Del.C. §4002(n). The Colonial Associations and Colonial have included a provision in their duly negotiated collective bargaining agreements requiring the Colonial School District to collect membership dues from the wages of members of the Colonial Associations, and service fees from the wages of the nonmembers.

3. The Colonial Paraprofessionals and Colonial Food Service Worker's collective bargaining agreements provide that the service fee is for "their proportionate part of the cost of collective bargaining, contract administration, grievance adjustment, and other duties and services related to being exclusive representative." Their agreements also provide that "the determination of such a fee shall be the sole responsibility of the Association and to be consistent with services rendered and costs incurred on behalf of all bargaining unit members." The

[Colonial] Transportation Association agreement provides that the "[s]ervice fee shall ... be as determined by the Association."

4. On August 21, 1995, the Christina Associations and Colonial Associations (collectively referred to as the "Associations") filed unfair labor practice charges against Christina and Colonial, respectively. The two charges, which were subsequently consolidated, requested, inter alia, that Christina and Colonial "[i]mmediately take efforts to collect and transmit to the [Associations] a service fee, in the full amount determined by the [Associations], from those bargaining unit members who have refused to become members of the [Associations], and to terminate those non-joining and non-paying bargaining unit members who are required to join the union or pay a service fee as a condition of employment pursuant to the collective bargaining agreement governing their bargaining unit..."

5. After the unfair labor practice charges were filed, the Christina and Colonial School Districts (collectively referred to as the "Districts") offered to take the following action:

> Upon notification of the identity of the nonmembers, the District[s] will deduct from the wages of the nonmembers the fair share fee calculated on the basis of the NEA and the DSEA expenses during the preceding year (i.e. 66.02% of NEA dues and 88% of DSEA dues) ... When the NEA and DSEA audits are completed in January, 1996, we assume that there will be a modest change in the fair share fee percentages of NEA and DSEA dues. At that point, the Districts and the Association[s] can agree upon the necessary adjustment in the amount of the fair share fee deductions so as to result in fair share fee deductions for the 1995/96 school year equal to the percentages of NEA and DSEA dues determined by the audits which will be completed in January, 1996.

6. The Association chose not to currently pursue the unfair labor practice charges and to accept the Districts' offer. The parties were unable, however, to reach any agreement on an unresolved issue. The Associations frame the issue as follows:

> Can the Districts refuse to deduct a fair share fee in an amount equal to 100% of the union dues (i.e. NEA and DSEA dues) from nonmembers who do not affirmatively object to the deductions described to them in the Hudson packet?

The Districts frame the issue as follows:

> Are nonmembers who fail to respond to the Hudson packet required to pay 100% of union dues, rather than an amount equal to the fair share fee established by the Associations?

Consequently, the parties requested and received permission from the Public Employment Relations Board to file briefs for the purpose of obtaining a declaratory statement regarding this unresolved issue. The parties also agreed to submit stipulated facts, which are set forth below:

II. Statement of Stipulated Facts

7. The parties have agreed that at the beginning of each school year, the Association will send to the nonmembers in their respective bargaining units the constitutionally required Hudson Packet the Associations send to nonmembers. Each nonmember is requested to chose an option set forth on page two of the sample Hudson packet.

8. The fair share fees for the nonmembers will be calculated based upon the current school year's union dues and percentages derived from the previous year's audit of the NEA and DSEA expenses. Each nonmember will be provided with an explanation of the calculations as well as a procedure for objecting to the deduction of the fair share fees. An escrow account will be established for any amounts reasonably in dispute until resolution of the challenges.

APPLICABLE STATUTORY PROVISIONS

> "Fair share fee" means a fee that a nonmember shall be required to pay to the exclusive representative to offset his or her per capita share of the exclusive representative's expenditures. Such fee shall be equal in amount to regular membership dues that a member of the exclusive representative is required to pay, including payments to the exclusive representative's affiliated organizations, or such lesser amount as is prescribed by the exclusive representative in compliance with the procedures contained herein. 14 Del.C. §4002(s).

"Nonmember" means an employee of a public school employer who is not a member of the exclusive representative, but who is represented in a collective bargaining unit by the exclusive representative for purposes of collective bargaining. 14 Del.C. §4002(t).

14 Del.C. §4019. Fair share fee.

(a) If the provisions of a collective bargaining agreement so provide, each nonmember of a bargaining unit shall be required to pay the exclusive representative a fair share fee.

(b) To implement fair share fee agreements in accordance with subsection (a), the exclusive representative shall provide the public school employer with the name of each nonmember who is obligated to pay a fair share fee, the amount of the fee that he or she is obligated to pay and a reasonable and lawful schedule for deducting said amount from the salary or wages of such nonmember. The public school employer shall deduct the fee in accordance with said schedule and promptly transmit the amount deducted to the exclusive representative.

(c) As a precondition to the collection of fair share fees, the exclusive representative shall establish and maintain a procedure that:

(1) Provides nonmembers with an adequate explanation of the basis for the fee;

(2) Provides nonmembers with a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker; and

(3) Provides an escrow for the amounts reasonably in dispute while such challenges are pending.

A public school employer shall not refuse to carry out its obligations under subsection (b) on the grounds that the exclusive representative has not satisfied its responsibilities under this subsection.

(d) Since fair share fees are collected each school year, in order to avoid undue delays in the receipt of, and determination of the validity of, fair share fees, any suit challenging a fair share fee must be filed within 6 months after receipt of the notice described in subsection (c), or within 6 months after the nonmember exhausts the procedure described in subsection (c), whichever is later.

ISSUE

The parties were unable to reach agreement as to the issue; therefore, the Hearing Officer establishes the issue to be:

> Where a collective bargaining agreement provides for the deduction of fair share fees from the wages of employees who are represented within the bargaining unit by an exclusive bargaining representative but who have not chosen to become members of that labor organization, can the exclusive bargaining representative direct the public school employer to withhold a fair share fee in an amount equal to 100% of membership dues from nonmembers who do not affirmatively object to the deductions described in the exclusive representative's Hudson packet [2], under 14 Del.C. §4019?

POSITIONS OF THE PARTIES

Associations:

The Associations assert the Districts "... cannot refuse to deduct a fair share fee in an amount equal to 100% of the union dues (i.e., NEA and DSEA dues) from nonmembers who do not affirmatively object to the deductions described to them in the Hudson packet because 14 Del.C. §§4002(s) and 4019 authorize the Associations to establish a fair share fee in an amount equal to union dues, and the United States Constitution permits the Associations to deduct the full amount of union dues as fair share fees from those employees who do not affirmatively object to the deduction." Associations Opening Brief, @ page 2.

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2 The United States Supreme Court, in Chicago Teachers Union, Local No. 1, AFT, v. Hudson (475 US 292 (1986)), held "... the constitutional requirements for the Union's collection of agency fees includes an adequate explanation of the basis of the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending." The Associations in the present matter provide non-members of the various bargaining units with a letter and supplemental information pursuant to this decision, which the parties mutually refer to as a "Hudson packet."

Districts:

The Districts argue that they are only required to deduct from the wages of nonmembers an amount equal to the fair share fee established by the Association They assert that once the Associations establish a fair share fee in an amount less than an amount equal to full membership dues, as the Associations do in their Hudson packet, that lesser amount is the established fair share fee all nonmembers are required to pay, by statute. The statute does not authorize the Associations to establish varying fair share fees based upon whether or not individual nonmembers respond to the Associations' Hudson packets.

OPINION

The Public Employment Relations Board (hereinafter "PERB") was first established to administer the Public School Employment Relations Act (hereinafter "PSERA"), 14 Del.C. Chapter 40 (1982). 14 Del.C. §4002, §4006(a). The statute mandates PERB provide a procedure for the filing and prompt disposition of petitions for declaratory statements concerning the applicability of any provision of the statute or rule or order of the PERB. The declaratory statement procedure, Regulation 6 of the Rules and Regulations of the Delaware Public Employment Relations Board (rev. 7/10/96) provides for expeditious determination of questions relating to potential unfair labor practices. The present petition was originally filed as two separate unfair labor practice charges against the Colonial and Christina School Districts, but was converted to a request for a declaratory statement by mutual agreement of the parties.

Regulation 6.1 limits the right of an employer, exclusive representative or employee to file a request for declaratory statement to situations where a real controversy exists. In subsection (c), the rule defines the criteria for the prerequisite controversy:

(c) A controversy exists within the meaning of the Regulation when:

(1) The controversy involves the rights and/or statutory obligations of a party seeking a declaratory statement;

(2) The party seeking the declaratory statement is asserting a statutory claim or right against a public employer, an exclusive representative or a public employees who has an interest in contesting that claim or right;

(3) The controversy is between parties whose interests are real and adverse; and

(4) The matter has matured and is in such a posture that the issuance of a declaratory statement by the Board will facilitate the resolution of the controversy.

It is clear that a real controversy exists between these parties concerning the public school employers' obligations under §4019 of the PSERA and that the issuance of a declaratory statement by the PERB should facilitate the resolution of this controversy.

The dispute in this matter results from the differing interpretations by the parties of the term "fair share fee." The Districts argue that the Associations do not have authority under the statute to establish differing fair share fees depending upon the response, or lack thereof, from individual nonmembers to the Associations' Hudson packets. The Associations assert that the statute does not limit its right to establish a fair share fee.

It is axiomatic that where statutory language is clear and unambiguous on its face that it should be interpreted so as to fulfill the clear intent. The definition of "fair share fee" found at §4002(s) specifically provides that a fair share fee shall be either equal to regular membership dues (including payments to the exclusive representative's affiliated organizations) OR "...such lesser amount as is prescribed by the exclusive representative in compliance with the procedures contained herein." §4002(s), emphasis added.

Section 4019(b) further sets forth the method by which the exclusive representative must advise the public school employer of the fair share fee in order to implement the fair share agreement. The representative is required to supply the employer with three pieces of information; namely, 1) the name of each nonmember who is obligated to pay a fair share fee, 2) the amount of the fee that he or she is obligated to pay, and 3) a schedule for deducting that amount from the salary or wages of such nonmember. §4019(b). This provision is written in the singular, referring to "each nonmember", establishing the fair share fee "he or she" is required to pay and the schedule by which that nonmember must meet his or her obligation.

The statute does not establish standards for establishment of a fair share fee by an exclusive representative, but only requires that as a precondition to collection the exclusive representative establish and maintain a procedure which meets the constitutional requirements set forth by the Supreme Court in Chicago Teachers Union, Local No. 1, AFT, v. Hudson (475 US 292 (1986)), namely:

> (1) Provides nonmembers with an adequate explanation of the basis of the fee;
>
> (2) Provides nonmembers with a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker; and
>
> (3) Provides an escrow for the amounts reasonably in dispute while such challenges are pending. 14 Del.C. §4019(c)

In this particular case, the Hudson packet, which was provided to each nonmember of the bargaining units represented by the Associations, clearly sets forth the options available to each individual nonmember. It provides in relevant part:

> ... As a service fee payer, you have the following options regarding the payment of your NEA and DSEA fee:

1. Pay a fee equal to the amount of NEA and DSEA dues charged to members of the Association, and an optional Local Association fee, as stated above;

2. Pay a fee equal to the amount of NEA and DSEA dues charged to members of the Association;

3. Object to supporting activities and expenditures determined by the Association to be nonchargeable, and therefore pay a reduced service fee in the amount stated in the preceding paragraph; or

4. Challenge the correctness of the amount determined by the Association to be chargeable to feepayers, and pay a service fee in an amount determined by an independent decision maker to be chargeable.

You have 30 days after the date of the postmark on the envelope containing this letter and its enclosures to notify the DSEA of the option you choose.... If you fail to respond in a timely manner, or if you fail to respond at all to this notice, you will be treated as through you had selected the option listed in #2 above. Furthermore, if you do not respond, or if you choose one of the first two options listed above, you waive your option to have the chargeable amount of the fee determined by an independent decision maker.

To help you gauge whether the Association's determination of its chargeable activities was correct, we have enclosed the following documents:

(a) Budgets for DSEA and NEA that contain projected expenditures for these Associations during the [designated] school year;
(b) Audited financial statement for DSEA of actual expenditures for [prior] fiscal year, including an audited breakdown of chargeable and nonchargeable expenditures by major category;
(c) DSEA's Agency Fee/Fair Share Fee Policy and Procedures;
(d) A memorandum explaining the contents of NEA's materials;
(e) Explanation of how chargeable/nonchargeable expenditures are calculated by DSEA;
(f) Audited financial statement for NEA of actual expenditures for [prior] fiscal year including an audited breakdown of chargeable and nonchargeable expenditures by major category;
(g) Explanation of NEA's chargeable/nonchargeable audited expenditures for the [prior] school year.

... If you do not object to paying the full service fee, the Association will use the entire amount to implement its program. If you state that you are opposed to the Association receiving amounts which it has determined will support nonchargeable activities but accept the Association's calculations, the Association will rebate the

> nonchargeable amount of [dollar figure] to you, which represents the difference between the full service fee and the amount the Association has determined to be chargeable to fee payers. If you object to paying the full service fee and want to challenge the correctness of the Association's calculation of its chargeable expenditure, your challenge will be referred to an impartial decision maker -- pursuant to the provisions of DSEA's Agency Fee/Service Fee Policy and Procedures -- who will hold a hearing and, based upon the evidence presented therein, make the final determination of the amount of your service fee.

If there is any question as to the appropriateness of the fee or the viability of the waiver, it is within the exclusive province of the affected nonmembers to seek redress.

The Districts' obligations, on the other hand, are clearly established in the final sentence of §4019 (b):

> The public school employer shall deduct the fee in accordance with said schedule and promptly transmit the amount deducted to the exclusive representative. (emphasis added).

The Districts' obligation is circumscribed by the clear language of the final sentence of §4019(c):

> A public school employer shall not refuse to carry out its obligation under subsection (b) on the grounds that the exclusive representative has not satisfied its responsibilities under this subsection.

The right to challenge the amount of an assessed fair share fee rests solely with affected employees, those individuals with an interest in the resolution of such disputes. The statute expressly provides that a public school employer cannot refuse to deduct the fair share fee established under §4019 by the exclusive representative.

DECISION

The statutory language is clear and unequivocal. The fair share fee assessed by the exclusive bargaining representative may be equal in amount to regular membership dues or a lesser amount, as determined by the exclusive representative.

14 Del.C. §4002(s). The public school employer is required to withhold the amount set forth by the exclusive representative and according to the schedule established by the exclusive representative. 14 Del.C. §4019(c). It is the exclusive right of the affected nonmembers to contest the appropriateness of the assessment.

/s/Deborah L. Murray-Sheppard
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/s/Charles D. Long, Jr.
Charles D. Long, Jr.
Executive Director
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Dated: November 22, 1996